

Supreme Court, U. S.
FILED

MAY 26 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1534

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR RESPONDENT IN OPPOSITION

Marshall B. Brinkley
General Counsel
One American Place
Suite 1630
Baton Rouge, Louisiana 70825
Saul Stone
Michael R. Fontham
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3300

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	13
A. <i>The Decision of the Commission, As Modified By the Supreme Court of Louisiana, Does Not Conflict With Any Constitutional Guarantee</i>	13
B. <i>The Decision to Rely on Fully Analyzed Data In the Computation of the Attrition Adjustment, and Not to Undertake an Analysis of New Evidence, Was Proper Regulatory Practice and Is Supported By the Unique Procedural History of this Case</i>	18
C. <i>The Decision of the Supreme Court of Louisiana Raises No Conflict With West Ohio Gas Co. v. Public Utilities Commission of Ohio (No. 2), Nor Does It Reflect "Developing Conflicts" Among State Regulatory Decisions</i>	22
CONCLUSION	26
CERTIFICATE	27

TABLE OF AUTHORITIES

	Page
Cases:	
<i>City of Miami v. Florida Public Service Commission</i> , 73 PUR3d 369 (Fla., 1968)	21-22
<i>Ex parte Application of South Central Bell Telephone Co.</i> , Order No. U-12785-A (La. Pub. Serv. Comm'n., 1977)	9
<i>Ex parte South Central Bell Telephone Co.</i> , Docket No. U-13388 (La. Pub. Serv. Comm'n.)	13,21
<i>Ex parte South Central Bell Telephone Co.</i> , Order No. U-12785-B (La. Pub. Serv. Comm'n., 1978)	12
<i>Ex parte South Central Bell Telephone Co.</i> , 15 PUR4th 87 (La. Pub. Serv. Comm'n., 1976)	2,18
<i>Federal Power Commission v. Hope Natural Gas Co.</i> , 320 U.S. 591, 64 S.Ct. 281 (1944)	15,18
<i>Federal Power Commission v. Natural Gas Pipeline Co.</i> , 315 U.S. 575, 62 S.Ct. 736 (1942) ..	17,18
<i>General Telephone Co. of the Southeast v. Alabama Public Service Commission</i> , 335 So.2d 151 (Ala., 1976)	25
<i>Morehouse Natural Gas Co. v. Louisiana Public Service Commission</i> , 245 La. 983, 168 So.2d 334 (1968)	15
<i>Mountain States Telephone & Telegraph Co. v. New Mexico State Corporation Commission</i> , 563 P.2d 588 (N.M., 1977)	24

TABLE OF AUTHORITIES (Continued)

	Page
<i>New England Telephone & Telegraph Co. v. Public Utilities Commission</i> , 358 A.2d 1 (R.I., 1976)	23
<i>New England Telephone & Telegraph Co. v. Public Utilities Commission</i> , 376 A.2d 1041 (R.I., 1977)	23
<i>New York Telephone Co. v. Public Service Commission</i> , 272 N.E.2d 554 (N.Y., 1971)	23
<i>Public Utilities Commission of Ohio v. United Fuel Gas Co.</i> , 317 U.S. 456, 63 S.Ct. 369 (1943)	21
<i>South Central Bell Telephone Co. v. Louisiana Public Service Commission</i> , 334 So.2d 189 (La., 1976)	17
<i>South Central Bell Telephone Co. v. Louisiana Public Service Commission</i> , 352 So.2d 964 (La., 1977)	5-6,11,14,16,17,20
<i>South Central Bell Telephone Co. v. Louisiana Public Service Commission</i> , No. 193,946 (La., 19th Jud. Dist. Ct.)	4,6,20
<i>South Central Bell Telephone Co. v. Louisiana Public Service Commission</i> , No. 59,541 (La., 1978)	10
<i>South Central Bell Telephone Co. v. Louisiana Public Service Commission</i> , No. 59,705 (La., 1978)	13
<i>Texas & P. Ry. Co. v. Railroad Commission of Louisiana</i> , 137 La. 1059, 69 So. 837 (1915)	22

iv
TABLE OF AUTHORITIES (Continued)

	Page
<i>West Ohio Gas Co. v. Public Utilities Commission of Ohio</i> (No. 2), 294 U.S. 79, 55 S.Ct. 324, 79 L.Ed. 773 (1935)	13,22,25
 <i>Constitutional Provisions and Statutes:</i>	
La. Const. Art. IV, §21(B)	14
La. Const. Art. IV, §21(D)	8,14
La. Const. Art. IV, §21(E)	14
INT. REV. Code §167	18
La. R.S. 45:1163.1	8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1534

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. When a state court, after an appeal, remands a rate proceeding for a limited period to the state's regulatory commission for the computation of the amount of an attrition allowance ordered by the court, is the court prohibited under federal constitutional principles from permitting the commission to base its decision on data already in the record that has been fully analyzed, or must it require the commission to accept new data that cannot be fully analyzed in the period of the remand?

2. When a state supreme court determines, on the basis of the entire record, that a lower court improperly implemented an excessive rate increase on the appeal of a decision of the state's regulatory commission, may the state supreme court permit the excessive rates to be refunded, or must it first order a remand for consideration of a new rate case to insure that changes in conditions do not provide an after-the-fact justification for the lower court's erroneous decision?

STATEMENT OF THE CASE

Petitioner, South Central Bell Telephone Company ("South Central Bell") filed an application for an \$89 million rate increase with respondent, the Louisiana Public Service Commission ("the Commission") in 1975. This application was denied in full by the Commission in June, 1976. *Ex parte South Central Bell Telephone Co.*, 15 PUR4th 87 (La. Pub. Serv. Comm'n., 1976). The record compiled by the Commission in analyzing the data of South Central Bell was "voluminous," consisting of "thousands of pages of testimony, exhibits, data summaries, computations and documents." *Id.* at 96.

A central issue presented by the application of South Central Bell related to the reliance of the company on a forecast of operating results for 1976 in support of its application. A forecasted test year had never previously been approved in Louisiana; yet South Central Bell urged the adoption of forecasted data as a major basis for its rate request. The Commis-

sion in its decision referred to this proposal of the company. It stated:

The company has urged the commission to use a forecast of 1976 investment and net operating income in determining the proper level of revenues and resulting rates in this proceeding.

Id. at 97.

The Commission determined that the forecasted data of South Central Bell would provide an inappropriate basis for setting rates. *Id.* at 97-100. Instead, the Commission determined that it was proper to use a recent test period for which actual data was available and could be fully analyzed prior to the issuance of a decision. The test year 1975 was chosen, as actual data for this period became available several months prior to the decision of the Commission and was subjected to scrutiny and analysis. *Id.* The Commission stated:

After due consideration of all these factors, this commission finds that the use of 1975 as the test year, giving benefit to South Central Bell of the latest average test-year actual results, appropriately balances the consideration applicable to selecting the test year, provides the most reliable source of figures on which to compute a fair rate of return, and fully protects the interests of South Central Bell.

Id. at 100.

The decision of the Commission was final on June 28, 1976. *Id.* at 87. At that time, the only data available for 1976 was a forecast.

An appeal of the decision of the Commission was taken by South Central Bell to a Louisiana district court. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, No. 193,946 (La., 19th Jud. Dist. Ct.). A major issue raised by South Central Bell was the reliance of the Commission on actual results for 1975 rather than the forecast for 1976. An assignment of error of South Central Bell stated: "The commission erred in adopting 1975 rather than 1976 as the proper test period in this case." *Id.*, Original Brief on the Merits on Behalf of South Central Bell Telephone Company at 25.

After several months of consideration of the appeal, the district court issued its Written Reasons for Judgment on January 4, 1977. The opinion upheld most of the determinations of the Commission, including the Commission's use of actual results for the year 1975 rather than the forecast of the company. The opinion of the district court stated:

The Court determines from its study of decisions of other regulatory bodies, as well as from the decision of the Louisiana Supreme Court, that the use of a historical year as a test period is not unreasonable and is consistent with good regulatory practice, provided that consideration is given to anticipated economic conditions in determining a fair rate of return.

Id., Written Reasons for Judgment at 11-12.

Thus, the district court approved the use of actual data rather than a forecast, but also required consideration of anticipated economic conditions. The district court

held that the Commission should have considered the effect of inflation. *Id.*, Written Reasons for Judgment at 30. It ordered the case remanded to the Commission for 45 days to make an allowance for attrition and compute the amount of another adjustment deemed necessary by the district court. *Id.*, Written Reasons for Judgment at 31. The district court stated:

The Court does not propose to tell the Commission what specific item should be adjusted, whether it be the cost of equity capital, rate base, or expenses, but in any event, the Commission should make an evaluation based upon the known inflation rate and make an adjustment in the rate of return much as other Commissions have done in order that a fair rate of return may be secured.

Id., Written Reasons for Judgment at 30.

The apparent meaning of the district court's holding was that, when the Commission used the actual results for 1975 rather than forecasted data, it should have considered the impact of the known inflation rate and made an attrition adjustment.

The events following the issuance of the Written Reasons for Judgment invest this case with a unique procedural history. Because these events are important to the determination of the Petition for a Writ of Certiorari, the Commission will briefly review them. A summary of the important facts is contained in the opinion of the Supreme Court of Louisiana. *South Central Bell Telephone Co. v. Louisiana Public Ser-*

vice Commission, 352 So.2d 964, 975-79 (La., 1977), rehearing denied (Feb. 24, 1978).

The decision of the district court contained a specific order of remand. The Written Reasons for Judgment stated:

[T]his cause is remanded ... for further proceedings in accordance with law and specifically for the purpose of making whatever adjustments in rates as are necessary to meet the aforesaid views herein expressed relative to actual rate of return and attrition allowance, said action to be completed within 45 days from the date of final judgment of this Court.

South Central Bell Telephone Co. v. Louisiana Public Service Commission, No. 193,946 (19th Jud. Dist. Ct., La.), Written Reasons for Judgment at 32.

On most of the issues presented to the district court, South Central Bell was not the prevailing party. Nevertheless, after the issuance of the Written Reasons for Judgment, South Central Bell prepared a formal judgment and submitted it to the district court. The Commission was not permitted to approve the form of the judgment, nor was it even informed of the submission of the judgment. The judgment was presented and signed in an *ex parte* proceeding. Although South Central Bell had never previously raised the assertion that new evidence was necessary for the computation of an attrition adjustment, the judgment

contained new language, inserted into the language formulated by the district court, requiring the receipt of new evidence. It said:

[T]his cause is remanded ... for further proceedings in accordance with law and specifically for the purpose of receiving evidence and making findings of whatever adjustments in rates are necessary under current circumstances to meet the aforesaid views herein expressed relative to actual rate of return and attrition allowance, said action to be completed within forty-five (45) days from the date of this judgment of this Court. (Emphasis added)

Id., Judgment.

Subsequent to the entry of the judgment, South Central Bell filed new evidence with the district court and the Commission. The new evidence contained data for a 1976 test year comprised of "actual" results for 11 months and estimated results for one month, and a forecast of results for the year 1977. This evidence was conclusionary in nature and contained none of the underlying data that would be necessary for a proper regulatory analysis of the evidence. The accuracy of the adjustments made by the company could not be determined from its conclusionary data, nor did this data provide a basis for determining whether other adjustments were necessary to offset abnormal results or implement sound regulatory principles. In the rate proceedings appealed to the district court, the Commission had fully examined the data of South Central Bell and compiled a record containing thousands of

pages. The newly filed data, in contrast, consisted of three affidavits and conclusionary exhibits comprising 42 pages. If accepted, the new evidence would have changed the data completely for rate base, expenses and revenues and in essence would constitute the beginning of a new rate case.

The filing of the new evidence by South Central Bell left the Commission in the position of determining what to do with *ex parte* evidence constituting a new rate filing based on a new test year. From a regulatory standpoint, the only acceptable alternatives available to the Commission were (1) computation of an attrition adjustment based on the record compiled by the Commission, or (2) use of the newly filed evidence only after it was fully analyzed. A full analysis of the new evidence, however, would require data requests and a thorough analysis of underlying data, open hearings for the presentation of views of interested parties, cross-examination of the witnesses who executed the affidavits in open hearings, presentation of witnesses on behalf of the commission if necessary, and a review and analysis of all the evidence. Under the Louisiana Constitution, the Commission is permitted as much as a year to complete this process. La. Const. Art. IV, §21(D). Under La. R.S. 45:1163.1, the one-year period for deciding a rate application is interrupted by any "subsequent substantial alteration of the application, petition, or proposed rate schedule" Nevertheless, the district court had remanded the case for only 45 days. Thus, the Commission could not consider the new evidence unless it was willing to forego a proper regulatory examination of the telephone company's data.

In view of these serious regulatory concerns and its uncertainty as to the meaning of the *ex parte* judgment, the Commission filed in the district court a motion to amend the judgment to alter phraseology "to eliminate any uncertainty that the receipt and consideration by the Commission of new evidence not contained in the record on the remand of this case is discretionary." This motion was denied, but the district court stated that consideration of the evidence was discretionary. This statement was later confirmed in writing. See discussion by the Louisiana Supreme Court at 352 So.2d 977.

In light of the ruling of the district court that consideration of the new evidence was discretionary, the Commission computed an attrition allowance based on the record that was compiled by the Commission. South Central Bell filed *nothing* concerning the proper attrition allowance to be computed on the basis of the record; it apparently was content to rely exclusively on its after-filed evidence. The Commission complied with the order of the district court and conducted a "detailed study" of attrition that took into account "inflation" and "current economic conditions." On the basis of the attrition factor determined by the Commission, a finding was made that an appropriate attrition allowance would amount to \$8,714,000. *Ex parte Application of South Central Bell Telephone Co.*, Order No. U-12785-A (La. Pub. Serv. Comm'n., 1977) (App., 90A *et seq.*).

After the record was returned to the district court, the decision of the Commission was overruled. The district court relied on the conclusionary affidavits of

South Central Bell, which had never been analyzed in an adversary proceeding, in granting a rate increase of \$26.3 million. The Commission immediately sought a stay in the Louisiana Supreme Court, but the stay was denied. The court stated:

Writ Denied: Adequate remedy by devolutive appeal or by answer to the utility's appeal, since the respondent utility may be ordered to refund any portion of the rate-increase held to be excessive on appeal.

*South Central Bell Telephone Co.
v. Louisiana Public Service Com-
mission, No. 59,541 (La., 1978).*

An appeal was taken by both parties to the Louisiana Supreme Court. After lengthy consideration, the court overruled the decision of the district court and upheld the decision of the Commission. The attrition adjustment computed by the Commission was reinstated. With respect to the refusal of the Commission to rely on the unanalyzed and conclusionary affidavits, the court stated:

The Commission's refusal on remand to adopt the Company's conclusions as to the amount which should be granted to offset attrition was not unreasonable. The Commission as a regulatory body has a duty to analyze a utility's data critically and its decision that this could not be done properly within the thirty-seven days remaining after its receipt of the data was not arbitrary or capricious. Ad-

ditional time in which to properly verify and scrutinize the information was requested by the Commission but denied by the district court. The commission was expressly informed by the district court that it should use its judgment as to the consideration of additional evidence. Under these circumstances the Commission's decision to use other methods to determine the amount of attrition, if any, rather than either accepting at face value the Company's conclusions or taking the extensive time necessary to verify new test year data was entirely reasonable.

*South Central Bell Telephone Co.
v. Louisiana Public Service Com-
mission, 352 So.2d 964, 978 (La.,
1977).*

The court resolved all issues presented in the case except for an evidentiary determination relating to the proper amount of the adjustment necessary to separate the intrastate and interstate plant and expenses of the company. A remand was ordered to recompute the separations adjustment and implement the court's findings. The court's instructions concerning the remand were direct and specific. It stated:

For the foregoing reasons the judgment of the district court is vacated and the case is remanded to the Commission with the following instructions. The Commission is directed to reinstate its original research and development adjustment, adopt the attrition allowance calculated by it on remand from the

district court, and reconsider and redetermine its factual finding that the Company dedicated one of its 176 exchanges entirely to FTS traffic during the test year. In reconsidering this factual issue the Commission may, within its discretion, take any additional evidence which it deems necessary. After complying with the above instructions and making any modifications of its separations adjustments necessitated by a redetermination of the factual question, the Commission shall proceed without taking further evidence to decide whether the Company is entitled to a rate increase, and to enter such order as justice may require.

Id. at 986.

Although the court ordered the Commission to "adopt the attrition allowance calculated by it on remand from the district court . . .," South Central Bell once again filed a conclusionary affidavit, consisting of one page, showing the alleged results for 1976, 1977 (based on a partial forecast), and a forecast for 1978. No underlying data was filed. The Commission recomputed the separations adjustment pursuant to the order of the court and determined that a rate increase of \$11,356,000 was justified instead of the \$26.3 million ordered by the district court. The Commission ordered a refund of the excessive rates collected since the decision of the district court was implemented. *Ex parte South Central Bell Telephone Co.*, Order No. U-12785-B (La. Pub. Serv. Comm'n., 1978). The Louisiana Supreme Court denied the motion of South Central Bell for further consideration of its new evidence.

South Central Bell Telephone Co. v. Louisiana Public Service Commission, No. 59,705, motion for further consideration denied (La., 1978).

On April 10, 1978, in a separate rate proceeding, South Central Bell was granted a \$39 million rate increase by the Commission. *Ex parte South Central Bell Telephone Co.*, Docket No. U-13388 (La. Pub. Serv. Comm'n.).

ARGUMENT

The decision of the Supreme Court of Louisiana does not raise a federal constitutional issue worthy of review by this Court. The Supreme Court of Louisiana was thoroughly familiar with the unusual procedural background of this case. The approval of the determination of the Commission to rely on data that had been reviewed and analyzed, rather than the conclusionary affidavits filed after an appellate proceeding by South Central Bell, was valid under constitutional and regulatory principles. The decision of the Supreme Court of Louisiana does not conflict with *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (No. 2), 294 U.S. 79, 55 S.Ct. 324, 79 L.Ed. 773 (1935), nor does it raise any "developing conflicts" with other state jurisdictions. Therefore, the petition for a writ of certiorari should be denied.

A. The Decision of the Commission, As Modified By the Supreme Court of Louisiana, Does Not Conflict With Any Constitutional Guarantee.

Under the Louisiana Constitution of 1974, the Commission is granted the power to "regulate all common carriers and public utilities" La. Const. Art. IV, §21(B). The Commission is granted "twelve months after the effective filing date" in which to make a decision. La. Const. Art. IV, §21(D). Appeals are taken first to a Louisiana district court, with a direct right of appeal available from the district court to the Supreme Court of Louisiana. La. Const. Art. IV, §21(E).

The standard of judicial review of decisions of the Commission under Louisiana law is similar to this Court's standard of review for federal regulatory agencies. In this case, the Supreme Court of Louisiana stated:

We have said that orders of the Commission are entitled to great weight and are not to be overturned unless shown to be arbitrary, capricious or abusive of its authority; that courts should act slowly in substituting their views for those of the expert body charged with the legislative function of ratemaking, and should not disturb the commission's decision in the absence of a clear showing of abuse of power; that Commission decisions will not be disturbed unless found to be clearly erroneous or unsupported by evidence. (Citations omitted).

South Central Bell Telephone Co. v. Louisiana Public Service Commission, 352 So.2d 964, 968-69 (La., 1977).

Compare *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 63 S.Ct. 281 (1944). The Supreme Court of Louisiana has also adopted the holding of *Hope Natural Gas* that "when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." (Citations omitted). *Id.* at 287. See *Morehouse Natural Gas Co. v. Louisiana Public Service Commission*, 245 La. 983, 168 So.2d 334, 339 (1968).

Under the applicable regulatory policy of the State of Louisiana, the function of the Commission is to review and analyze the basic data submitted by the utility in support of its rate application. The accounting selections and proposals of the utility should not be accepted without examination. These principles were articulated in the decision of the Supreme Court of Louisiana. It stated:

[T]o arrive at the ultimate figures used in these calculations requires extensive examination of the utility's operations and frequent exercise of informed judgment. Every aspect of the utility's operations during the test year must be examined in order to determine the extent to which the figures it has received from the utility are representative of the figures that will, or should, prevail in the future [A]uditing may lead the agency to question whether particular expenditures or investments are properly chargeable to utility

operations, whether capital expenditures have been improperly charged to operating expenses or operating expenses improperly capitalized, whether accruals for reserves have been made at appropriate levels, and whether any expenses incurred during the test year are properly chargeable to some other period of time. If the rate making agency determines that any such matter has been improperly treated from a regulatory standpoint, appropriate adjustments must be made to the operating results.

South Central Bell Telephone Co. v. Louisiana Public Service Commission, 352 So.2d 964, 968 (La., 1977).

In a major rate case involving large amounts of evidence, the process of analyzing the utility's evidence requires extensive discovery, open hearings, analysis of underlying data, and adjustment of improper proposals and selections of the utility.

In this case, the Commission followed accepted regulatory practice in relying on actual data for a recent test year as the basis for its decision. It was South Central Bell, not the Commission, that proposed the use of " 'prophecy' and 'forecasts' " and advocated the "shutting [of] eyes to the 'realities' of 'experience.' " Petition for a Writ of Certiorari at 9. At the time of the decision of the Commission, the data for the 1975 test year was very recent and indeed had been available for only a few months; the data for 1976 and 1977, on the other hand, was based on a prophecy by the utility.

The decision of the district court to require any "attrition adjustment," and the approval of this decision by the Supreme Court of Louisiana, was a matter of regulatory policy rather than a constitutional requirement. The Supreme Court of Louisiana, in an earlier hearing relating to the same rate case, held that South Central Bell was not suffering confiscation even if the data of the company were accepted as true. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 334 So.2d 189, 191 (La., 1976). Regulated utilities are entitled only to the opportunity to earn a fair rate of return; indeed, "regulation does not insure that the business shall produce net revenues." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590, 62 S.Ct. 736 (1942). On the basis of recent historical data, the Commission found that South Central Bell earned a fair rate of return and this decision was upheld by the Supreme Court of Louisiana. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 352 So.2d 964, 973-75 (La., 1977). An "attrition allowance" was not mandated by the federal constitution. *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra*.

The issue purportedly raised by South Central Bell has federal constitutional dimensions only if the requirement of an "attrition allowance" is a constitutional necessity. If the courts of Louisiana wish to provide a utility with a rate in the "zone of reasonableness" that is above "the lowest reasonable rates," the method of computing the adjustment should not run afoul of constitutional principles. *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra* at 588. South Central Bell has not demon-

strated that the constitution mandates adjustments for attrition; indeed, *Hope* and *Natural Gas Pipeline* suggest the contrary.

The decision of the Supreme Court of Louisiana concerning the computation of an attrition allowance does not conflict with any federal constitutional guarantee. The method of dealing with the attrition issue is a matter of state regulatory policy. No valid constitutional issue is presented in the petition for a writ of certiorari.

The Commission contended and, we believe, demonstrated in the Supreme Court of Louisiana that no attrition allowance was necessary even as a matter of regulatory policy. The telephone company enjoys substantial productivity that offsets attrition and the cost of capital decreased after the decision of the Commission was rendered. In addition, no adjustment was made by the Commission for huge amounts of federal "deferred taxes" that are treated as an expense by South Central Bell but not paid to the government. These taxes in reality are deferred indefinitely and the accounting treatment of the company provides it with a substantial source of cash. See Int. Rev. Code §167. In the test year, the amount of accumulated deferred taxes was more than \$51 million. As these funds are available for any purpose chosen by South Central Bell, they are available to offset attrition. See *Ex parte South Central Bell Telephone Co.*, 15 PUR4th 87, 116-19 (La. Pub. Serv. Comm'n., 1976).

B. The Decision to Rely on Fully Analyzed Data In the Computation of the Attrition

Adjustment, and Not to Undertake an Analysis of New Evidence, Was Proper Regulatory Practice and Is Supported By the Unique Procedural History of this Case.

Even if an attrition adjustment were a constitutional requirement, the Supreme Court of Louisiana properly upheld the allowance computed by the Commission. The adjustment of the Commission was based on the data in the record at the time of its original decision. This evidence had been reviewed and analyzed. The new data filed by the company after the remand, on the other hand, was conclusionary, involved partial or total forecasts, and could not be subjected to a proper regulatory analysis in the period of the remand. As the Supreme Court of Louisiana stated:

The Commission as a regulatory body has a duty to analyze a utility's data critically and its decision that this could not be done properly within the thirty-seven days remaining after its receipt of the data was not arbitrary or capricious. Additional time in which to properly verify and scrutinize the information was requested by the Commission but denied by the district court. The Commission was expressly informed by the district court that it should use its judgment as to the consideration of additional evidence. Under these circumstances the Commission's decision to use other methods to determine the amount of attrition, if any, rather than either accepting at face value the Company's conclusions or tak-

ing the extensive time necessary to verify new test year data was entirely reasonable.

South Central Bell Telephone Co. v. Louisiana Public Service Commission, 352 So.2d 964, 978 (La., 1977).

Had an attrition adjustment been computed by the Commission at the time of its decision, the only actual results on which the allowance could be based were the results in the record at that time.

The claim of South Central Bell that "due process" was denied by the action of the Commission is ludicrous in light of its own tactics in the district court. South Central Bell was not the prevailing party on the appeal; yet it prepared a judgment and submitted it to the district court without allowing the Commission an opportunity to review the judgment. South Central Bell included numerous quotes in the judgment from the language of the Written Reasons for Judgment and restated most of the remand order from the Written Reasons for Judgment. App., 86a-89a. However, the company inserted additional language which required the receipt of new evidence on the remand. When the Commission moved to amend the judgment to alter the phraseology, South Central Bell contended that the inserted language was substantive in nature and could be deleted only on a motion for new trial, but the time for filing a motion for new trial had expired. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, No. 193,946 (La., 19th Jud. Dist. Ct.), Opposition to Defendant's Motion to Amend Judgment at 2. Nevertheless, the dis-

trict court stated that consideration of the new evidence was discretionary.

Although South Central Bell contends that its rights were denied when the Commission refused to consider new "operating results" on the remand from the Supreme Court of Louisiana, the order of remand was specific and did not contemplate the consideration of a new rate case. The remand called only for the determination of a proper separations adjustment. As South Central Bell admits, it "requested [in a motion for rehearing] that the remand be broadened to require a hearing on the appropriateness of the commission's attrition calculations," but "[r]ehearing was denied" Petition for a Writ of Certiorari at 6. The constitution does not require the institution of a new rate case every time a rate proceeding is remanded for a specific purpose to a regulatory body.

The order of the Commission merely requires the refund of excessive rates collected under the improper decision of the district court. The contention of South Central Bell that new evidence should be considered to justify these excessive rates is in essence a request for retrospective ratemaking. South Central Bell was entitled to, and received, consideration of its new evidence in a full rate case involving the prospective setting of rates. *Ex parte South Central Bell Telephone Co.*, Docket No. U-13388 (La. Pub. Serv. Comm'n.). However, it is not entitled to a retrospective readjustment of rates, even if the rates were actually collected under an invalid court order. See *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 464, 63 S.Ct. 369, 374 (1943); *City of Miami v. Florida*

Public Service Commission, 73 PUR3d 369, 382 (Fla., 1968); *Texas & P. Ry. Co. v. Railroad Commission of Louisiana*, 137 La. 1059, 69 So. 837 (1915).

C. The Decision of the Supreme Court of Louisiana Raises No Conflict With *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (No. 2), Nor Does It Reflect "Developing Conflicts" Among State Regulatory Decisions.

The authorities relied on by South Central Bell do not raise constitutional conflicts with the decision of the Supreme Court of Louisiana. The decision of this Court in *West Ohio Gas Co. v. Public Utilities Commission* (No. 2), 294 U.S. 79, 55 S.Ct. 324 (1935), the case relied on most heavily by South Central Bell, is not inconsistent with the holding of the Supreme Court of Louisiana. The state regulatory decisions relied on by South Central Bell are also inapplicable. These decisions do not purport to make federal constitutional law and are not inconsistent with the decision in this case in any event.

In *West Ohio Gas*, the Ohio Commission in 1933 ordered a refund for the years 1930 and 1931 based on evidence for 1929. 55 S.Ct. at 325. Even for the year 1929, the commission's conclusion of adequate revenues was "the result of mathematical errors." *Id.* The commission at the time of its rate hearings refused to consider the evidence for 1930 and 1931, which was available and offered by the company, but this refusal did not occur on a remand. *West Ohio Gas* merely supports the Commission's use of recent ac-

tual data; it does not require a full examination of a new rate case on every remand, nor does it support the request of South Central Bell for retrospective ratemaking.

New England Telephone & Telegraph Co. v. Public Utilities Commission, 376 A.2d 1041 (R.I., 1977), does not support the company. As South Central Bell suggests, the decision of the Supreme Court of Rhode Island did require the Rhode Island commission to consider updated evidence on remand in considering an erosion allowance. However, the period of the remand was not 45 days, but *nearly seven months*. The decision ordering the remand was issued May 20, 1976 and the order of the Commission was issued December 10, 1976. *Id.* at 1043-44; *New England Telephone & Telegraph Co. v. Public Utilities Commission*, 358 A.2d 1 (R.I., 1976). No time limit for consideration of the remand was imposed on the Rhode Island commission by the court. Thus, the commission in the Rhode Island case had a full opportunity on remand to protect the interests of ratepayers by fully analyzing newly-filed evidence — an opportunity that did not exist in this case.

In *New York Telephone Co. v. Public Service Commission*, 272 N.E.2d 554 (N.Y., 1971), the commission relied on a 1968 test year in an order entered July 1, 1971. During the course of proceedings before the commission, petitions for the consideration of data for a 1969 test year and a period including three months of 1970 were denied. This data, of course, was actual past data older than the data relied on by the Commission in this case. The court held only that the 1968 evidence

relied on by the New York commission was too stale and a more recent past test year should have been utilized. The New York decision supports the Commission's use of a recent past test year and provides no basis for the acceptance of data that does not become available until the end of an appeal.

In *Mountain States Telephone & Telegraph Co. v. New Mexico State Corporation Commission*, 563 P.2d 588 (N.M., 1977), the commission issued an order authorizing a rate increase of nearly \$13 million in July, 1975. However, the commission failed to implement the rates submitted to it. The final decision of the New Mexico Supreme Court was rendered nearly two years subsequent to the decision of the commission authorizing a rate increase. The court held that the commission should have implemented its own decision promptly and the failure to authorize the necessary rates was error.

The remand of the New Mexico case to the commission was not a temporary remand such as the district court ordered in this case. The case was returned to the "jurisdiction" of the New Mexico commission for a regulatory process to begin anew. To the extent that new rate proceedings were contemplated in that case, the court apparently presumed that the full period for consideration of the case could be utilized by the commission. The court ordered that, to the extent higher rates were requested by the telephone company, "the Commission shall take into consideration the most recent figures available after this matter comes under its jurisdiction again." *Id.* at 603. This order merely requires the use of a recent period for which actual

figures are available as the basis for deciding a rate case prior to an appeal.

General Telephone Co. of the Southeast v. Alabama Public Service Commission, 335 So.2d 151 (Ala., 1976), is also inapplicable. In *General Telephone*, a disagreement arose between the parties as to the actual capital structure of the company reflected by the record. The court apparently was unable to resolve the dispute. Therefore, it remanded the case to permit the commission to make this determination. The court stated:

Faced with these conflicting calculations which are based upon the same record, and with the duty to make a determination of the question upon our independent judgment as to both law and facts, we find that the best way to determine what actually happened would be to remand the cause to the Commission for a limited reopening of the hearing.

Id. at 158.

This "limited" remand for a determination of the capital structure hardly supports the position of South Central Bell.

The above authorities and other cases cited by South Central Bell do not support the so-called "developing conflict over application of *West Ohio Gas*." Petition for a Writ of Certiorari at 12. The decision of the Supreme Court of Louisiana is constitutionally sound and consistent with proper regulatory policy.

CONCLUSION

No federal constitutional issue is raised by the Petition for a Writ of Certiorari. The decision of the Supreme Court of Louisiana properly applied sound regulatory principles. The unique procedural history of this case makes it an unlikely vehicle for the development of constitutional law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Marshall B. Brinkley
General Counsel
One American Place,
Suite 1630
Baton Rouge, Louisiana 70825
Telephone: (504) 389-5867

Saul Stone
Michael R. Fontham
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

CERTIFICATE

I certify that copies of the foregoing brief have been mailed, postage prepaid, to M. Robert Sutherland, Esq. and Norman C. Frost, Esq., P.O. Box 771, Birmingham, Alabama 35201, J. Robert Fitzgerald, Esq. and Ronald W. Tweedel, Esq., 1215 Prytania Street, New Orleans, Louisiana 70130, and Victor A. Sachse, Jr., Esq., P.O. Box 3197, Baton Rouge, Louisiana 70821, this ____ day of May, 1978.

Michael R. Fontham